

BRIG DOLPHIN.

LETTER FROM THE ASSISTANT CLERK OF THE COURT OF CLAIMS,
TRANSMITTING A COPY OF THE CONCLUSIONS OF FACT AND
LAW IN THE FRENCH SPOILIATION CASES RELATING TO THE
BRIG DOLPHIN AGAINST THE UNITED STATES.

JANUARY 18, 1902.—Referred to the Committee on Claims and ordered to be printed.

COURT OF CLAIMS,
Washington, D. C., January 17, 1902.

SIR: Pursuant to the order of the Court of Claims, I transmit herewith the conclusions of fact and of law and of the opinion of the court, filed under the act of January 20, 1885, in the French spoliation claims set out in the annexed findings of the court relating to the vessel, brig *Dolphin*, Samuel Miller, master.

Respectfully,

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Hon. DAVID B. HENDERSON,
Speaker of the House of Representatives.

[Court of Claims. French spoliations. (Act of January 20, 1885; 23 Stat. L., 283.) Decided April 15, 1901. Brig *Dolphin*, Miller, master.]

No. of case.	Claimant.
2519.	Richard H. T. Taylor, administrator of David Otis, <i>v.</i> the United States.
3426.	David Chamberlain, administrator of Samuel Miller, and George B. Sawyer, administrator of Samuel Nickels, <i>v.</i> the United States.
1838.	Edward N. Dingley, administrator of William Nickels, <i>v.</i> the United States.
3177.	Charles F. Adams, administrator of Peter C. Brooks, and A. Lawrence Lowell, administrator of Nathaniel Fellowes, <i>v.</i> the United States.

PRELIMINARY STATEMENT.

These cases were tried before the Court of Claims on the 19th day of March, 1891. The claimants were represented by John St. C. Brookes, Rufus K. Sewell, William T. S. Curtis, and Theodore J. Pickett, esqrs., and the United States, defendants, by the Attorney-General, through his assistants in the Department of Justice, Charles W. Russell, esq., with whom was Assistant Attorney-General Louis A. Pradt.

CONCLUSIONS OF FACT.

The court, upon the evidence and after hearing arguments and considering the same with the briefs of counsel on each side, determine the facts to be as follows:

I. The brig *Dolphin*, Samuel Miller, master, sailed July 5, 1797, on a commercial voyage from Wiscasset, Mass. (now Maine), bound to the West Indies. While

peacefully pursuing said voyage she was seized on the high seas on or about the 15th day of August, 1797, by the French privateer *La Bien Aimee*, and taken to Basse Terre, Guadeloupe, where said vessel and cargo were condemned and sold by the French prize tribunal and thereby became a total loss to the owners thereof.

The proceedings of the French court were as follows:

On the 19th day of August, 1797, a preliminary decree was rendered in the words following:

"We, the judges of the tribunal of commerce, considering the document laid before us relating to the seizure made by the privateer *La Bien Aimee*, Captain Robert, of the brig *Dolphin*, Captain Samuel Miller, shipped from Wiscasset, State of Massachusetts, for Marie Gelente, as appears from her papers; considering also, attached to said papers, the declarations and interrogatories made before the municipality of this town on the 29th of Termidor last, and having heard upon this case the citizen commissary of the executive directory in said tribunal; having also heard this report, and all considered;

"Whereas can not be found on board of said brig *Dolphin* any invoice, bill of lading, signed by the owners of the cargo, nor any instructions from them relating to the sale, as is the general custom in commerce, the tribunal orders that Samuel Miller, captain of said brig, will return in four months the proof, duly certified by the consul of the Republic in the State of Massachusetts, and by presenting to him their commercial records that said cargo belongs to citizens of the United States of America;

"And in order to avoid the decay and embezzlement of said cargo, it is ordered provisionally that it shall be sold to the highest and last bidder in the accustomed manner, an inventory of everything belonging to said cargo being first made in presence of said Capt. Samuel Miller, or of said person duly appointed; the sum realized by said sale to be deposited, until final judgment is rendered, with a merchant of this town, agreeable to both parties, or who shall be appointed by the court.

"And in order to preserve said brig in view of the winter season, it is ordered that she will be taken to Lancala Barque under such care as accepted by the parties."

The master of the vessel accordingly returned to Massachusetts to procure proof of the ownership and neutrality of the cargo within the time prescribed by the foregoing decree, and presented such proofs to the prize court. On the 7th day of December, 1797, a final decree was rendered in the terms following:

"In the name of the French people, the tribunal of commerce established in the island of Guadeloupe, sitting in the city of Basse Terre in the said island in its ordinary sitting of the 17th Frimaire, year six, in the morning.

"Having seen the judgment rendered by the tribunal the 2d Fructidor last in the relation to the brig *Dolphin*, capture made by the privateer *La Bien Aimee*, declaring that the master of the said brig *Dolphin* should produce within four months proof made out in legal form before the consul of the Republic in the State of Massachusetts and by the production of their merchantile books that the cargo belongs to citizens of the United States of America.

"Considering that the master, Samuel Miller, has not sufficiently proved by the statement he has made of the official report from the French consul in Massachusetts and other places under date of 1st Brumaire last, and by the documents thereto annexed, the whole produced on trial, of the American ownership of the cargo of the said brig; considering that citizen Mozard, consul, has declared that there were presented to him books informal and insufficient for the purpose of establishing a judgment which could cover the exact purview of the law, ordinance of 1682, article 6, concerning captures, expressed in these terms, 'vessels, moreover, with their cargoes shall be good prize upon which there shall not be found charter party, bill of lading, or invoices, etc.' Considering, moreover, that the papers produced make no mention at all of the destination—

"The tribunal, deciding in favor of the address of the commissioner of the executive directory in applying the law above cited, declares the said brig *Dolphin* good prize, and orders that she be sold with her rigging and furniture; and whereas by virtue of the judgment of above date the sale has been made of the cargo, and the proceeds thereof were obliged to be placed in the hands of a keeper and depositary, orders that the price of the two sales as well that made as that to be made shall belong to the captors, owners of, and those interested in the said privateer *La Bien Aimee*."

II. The *Dolphin* was a duly registered vessel of the United States of 135 $\frac{3}{4}$ tons burden, was built at New Castle, Mass., in the year 1790, and was owned solely by William Nickels, Samuel Nickels, and David Otis, citizens of the United States, residing, the first two in New Castle and the last one in Bristol, Mass.

III. The cargo of the *Dolphin* consisted of lumber and other merchandise, and was owned by the said William Nickels, Samuel Nickels, and David Otis, owners of the vessel.

IV. The losses caused by the capture and condemnation of the *Dolphin* were as follows:

The value of the vessel was.....	\$4,736
The value of the cargo	4,647
Premium of insurance paid on vessel and cargo	125
Total	9,508

V. Case No. 1838. William Nickels was the owner of one-third of the vessel and of one-third part of the proceeds from sale of the cargo, sold under order of French tribunal (after deducting the interest therein of the master, mate, and crew). His losses were as follows:

One-third of the value of the vessel	\$1,578
One-third part of proceeds of cargo	1,414
Premium, insurance on vessel and cargo	125
Total	3,117

From which is to be deducted amount of insurance received under said policy. 500

Leaving his net loss 2,617

VI. In case No. 2519. David Otis was the owner of one-third of the vessel and of one-third part of the proceeds of the cargo (after deducting the interest therein of the master, mate, and crew). His losses were as follows:

One-third value of vessel	\$1,578
One-third part of proceeds of cargo	1,414
Total	2,992

VII. In case No. 3426. Samuel Nickels was the owner of one-third the vessel and of one-third part of proceeds of the cargo (after deducting the interest therein of the master, mate, and crew). His losses were as follows:

One-third of the value of vessel	\$1,578
One-third part of proceeds from sale of cargo	1,414
Total	2,992

VIII. In case No. 3426. Samuel Miller was the owner of—

One twenty-first part of lumber, etc., sold	\$221
One keg of chewing tobacco, similarly sold	20
Total	241

IX. In case No. 3177. Nathaniel Fellowes paid insurance on vessel and cargo in the office of Peter C. Brooks, account William Nickels, to the amount of \$500.

X. No insurance appears to have been effected by the said David Otis or the said Samuel Nickels on their respective interests in either the vessel or cargo, and none by the said Samuel Miller on his interest in the cargo.

XI. The claimants have produced letters of administration, respectively, for the estates on which they have severally been appointed and qualified, and have otherwise proved to the satisfaction of the court that the several parties on whose estates they are the administrators, respectively, were the same persons who suffered the aforesaid losses, respectively, and were the original sufferers.

XII. Said claims were not embraced in the convention between the United States and the Republic of France, concluded on the 30th day of April, 1803, and were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22d day of February, 1819, and were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th day of July, 1831. The claimants, in their respective capacity, are the owners of said claims, which have never been assigned except as aforesaid.

CONCLUSIONS OF LAW.

The court decides, as conclusions of law, that said seizure and condemnation of the vessel were illegal, and the owners and insurers had valid claims of indemnity therefor upon the French Government prior to the ratification of the convention

between the United States and the French Republic, concluded on the 30th day of September, 1800; that said claims were relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are entitled to the following sums from the United States for the illegal seizure and condemnation of the vessel:

Edward N. Dingley, administrator of the estate of William Nickels, deceased.	\$1, 363
Richard H. T. Taylor, administrator of the estate of David Otis, deceased.....	1, 578
George B. Sawyer, administrator of the estate of Samuel Nickels, deceased....	1, 578
A. Lawrence Lowell, administrator of the estate of Nathaniel Fellowes, deceased.....	286
Total.....	4, 805

And the court further decides that the above-named claimants, and likewise the claimant David Chamberlain, administrator of the estate of Samuel Miller, deceased, are not entitled to indemnity for the loss of the cargo.

OPINION.

Nott, Ch. J., delivered the opinion of the court.

This case is remarkable in being the only one of the thousands in the files of the court, so far as is known to counsel or to the court, in which a French prize court in the West Indies granted the equitable privilege of proving a material fact which a vessel's papers failed to show. That is to say, it appears by the preliminary decree, set forth in the findings of fact, that the tribunal of commerce sitting at Basse Terre, in the island of Guadeloupe, finding that the vessel carried no proof that the cargo belonged to citizens of the United States, allowed the master of the vessel four months in which to return to Massachusetts and procure the requisite proofs.

When the case again came to a hearing, the final decree recites, the French consul in Massachusetts had reported "that there were presented to him books informal and insufficient for the purpose of establishing judgment." The decree also declares "that the master has not sufficiently proved by the statement he has made of the official report from the French consul" and "by the documents thereto annexed, the whole produced on trial, of the American ownership of the cargo." The decree therefore declared the *Dolphin* and cargo and the proceeds thereof be good prize and paid to the captors.

At the time when the vessel was seized, 15th August, 1797, the treaty with France of 1778 was still in force. That treaty prescribed the evidence of nationality which American and French vessels should carry, and there is nothing in the case which shows that the *Dolphin* complied with the treaty in any one particular. She was sailing, in time of war, in the neighborhood of belligerent ports, and in the absence of such papers her voyage was suspicious and she was liable to seizure and investigation. The master, in his protest, says that his papers were taken from him, but neither his protest nor the decree of the court show that the vessel carried a passport or any designated paper. The decree in the case went a little further in designating certain papers, which she did not carry, which would have shown the ownership, and consequent neutrality of the cargo. Guilty of such irregularities in time of war, all that the master was entitled to the French court granted—ample time to proceed to his home port and procure evidence of ownership and neutrality.

If better evidence of the ownership of the cargo could not be produced before the French consul, it was the owners' misfortune. If better was produced than is recited in the decree, which can not now be shown to this court, it is the claimants' misfortune. The primary cause of seizure was the fault of the vessel in not carrying the prescribed evidences of nationality and neutrality. All that the French court could be reasonably asked to grant was granted, and on the record as it stands this court can not say that the French court reached a wrong conclusion, much less that it acted in an illegal, unreasonable, or unjust manner.

Concerning the vessel the case is not so clear. As before said, it does not appear that she carried a passport; but it does appear that her nationality was shown to the prize court by her register. There are also some facts appearing on the record which lead to the conclusion that the French court recognized her nationality.

In the first place, it appears by the protest that the vessel's papers, whatever they were, passed into the possession of the captors and of the prize court. In the second place, the preliminary decree is directed solely against the cargo, the absent papers which it recites not being papers which affected the vessel. And the leave given to the master to return to Massachusetts and procure evidence is in terms applicable

only to the cargo. No question whatever is raised in the preliminary decree as to the nationality of the vessel. It is a case of where *exceptio probat regulam*. If the court was not then satisfied as to the nationality of the vessel, leave should have been, and we may say, would have been granted to enable the master to likewise procure the necessary and formal proof. In the third place, the preliminary decree does not direct the condemnation or sale of the vessel, but on the contrary provides that in order to preserve said brig "it is ordered that she be taken to Lancala Barque under such care as accepted by the parties," which shows that there was no determination to condemn then. In the fourth place, the condemnation and final decree is not upon the ground that the nationality of the vessel has not been shown, but upon the ground that by French law, the ordinance of 1682, "vessels with their cargoes shall be good prize upon which there shall not be found charter-party, bill of lading, or invoices." Condemnation for that cause, that is to say, because a French statute so provided, was illegal. Neither the treaty of 1778 nor the international law of the time would then justify the condemnation of a vessel because of belligerent ownership of her cargo or a portion of her cargo.

For these reasons it must be held that the claimants are legally entitled to indemnity for the seizure and condemnation of their vessel, but that they are not entitled to indemnity for loss of their cargo.

As this vessel was carrying a cargo all of which, so far as appears, was liable to legal condemnation, and as the fault was the vessel's, no freight earnings should be recovered.

The only insurance effected was \$500, in favor of one of the owners, upon "vessel and cargo." For the insurance upon the cargo the defendants are not liable. The policy value of this owner's interest in the vessel was \$2,000, about four-sevenths of the valuation of the vessel and of the cargo. The underwriter, therefore, should recover only four-sevenths of the insurance he paid, to wit, \$286; and the assured owner should recover only four-sevenths of the premium which he paid, to wit, \$71.

The cases will be so reported to Congress, together with a copy of this opinion.

By THE COURT.

Filed, April 15, 1901.

A true copy.

Test, this 17th day of January, 1902.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

